And, so long as the authority to which that power is delegated keeps within these limits and observes the rules appointed by the law for the exercise of that power then his decision must be accepted. We know of no case that would justify us in interfering with the findings of a trial Judge on a question of fact which are based entirely on the assessment of credibility which ignore no relevant fact, which take into no account no fact that is irrelevant and where there has been no substantial contravention of any rule of law or judicial procedure.

As regards sentence, rape is a serious offence and we cannot regard the sentence imposed in this case as in any way excessive.

The appeal is dismissed.

Appeal dismissed.

Solicitors: *Braddell & Ramani.*

PUBLIC PROSECUTOR v. CHI AH KOW & ORS.

[A. Cr. J. (Adams J.) June 18, 1962]

[Johore Bahru — Criminal Appeal No. 6 of 1962]

Customs Ordinance, 1952, s.131(1)(e) and (iii) — Prohibition of imports — Importation of South African goods — Customs (Prohibition of Imports) Order, 1960.

Evidence — Prohibited goods — Articles labelled "product of South West Africa" — Whether this is prima facie evidence of origin — Evidence Ordinance, 1950, s.106.

The respondents were charged under section 131(1)(e) of the Customs Ordinance, 1952 for knowingly conveying in a motor lorry 141,200 packets of firecrackers, 400 lbs. of saccharine and 400 dozen tins of sardines manufactured in the Union of South Africa. The first and 3rd respondents were convicted on the first and second charges and were acquitted without their defence being called on the third charge. The second accused was acquitted of all three charges. The Public Prosecutor appealed against the acquittal of the second respondent on all the three charges and against the acquittal of the 1st and 2nd respondents on the third charge. He also appealed against the sentence imposed on the 3rd respondent because he had a previous conviction under the Customs Ordinance. It was argued for the prosecution that (i) explanation of the 2nd respondent that he was merely a lorry attendant and only carried out the duties as such attendant was highly unreasonable, (ii) the acquittal of the 1st and 3rd respondents in respect of the 400 dozen tins of sardines was wrong because they were labelled to be a product of South West Africa and therefore prohibited under the Customs (Prohibition of Imports) Order, 1960.

Held: (1) on consideration of all the evidence in this case the explanation of the second accused was reasonable under the circumstances;

(2) if an article is labelled as in this case that it is a product of South West Africa then that is *prima facie* evidence that it is a product of South West Africa.

Per curiam: ".....Any South African goods in the country are prohibited goods, and that they became so at the date of the coming into force of the Order, and if the owner of those goods wants to claim the protection of paragraph 2(1) then under the normal provisions of law contained in section 106 of the Evidence Ordinance, the onus is on the owner to show that he is entitled to take advantage of that privilege or exemption."

Cases referred to:—

(1) *Chee Shih Kwang* v. *Public Prosecutor* [1955] M.L.J. 127.

(2) *Saminathan* v. *Public Prosecutor* [1955] M.L.J. 121.

(3) *Quek Thiam Ting & Anor.* v. *Rex* [1947] M.L.J. 27.

(4) *Ng Kim Huat* v. *Public Prosecutor* [1961] M.L.J. 308.

MAGISTRATE'S CRIMINAL APPEAL.

Hamzah bin Dato Abu Samah (Deputy Public Prosecutor) for the appellant.

Omar bin Saleh for the 2nd respondent.

1st and 3rd respondents in person.

Cur. Adv. Vult.

Adams J.: The respondents in this appeal are Chi Ah Kow, Loo Eng Hock and Kamoo bin Alladin. All three respondents were charged in the Sessions Court, Johore Bahru, as follows:—

"**1st charge:**

That you, (1) Chi Ah Kow, (2) Loo Eng Hock and (3) Kamoo bin Alladin at about 5.00 a.m. on 4.11.61, at the 14th mile Gelang Patah Road, Johore, were knowingly concerned in conveying in Motor Lorry No: NA 4079 prohibited goods, to wit 74 gunny sacks containing 141,200 packets Firecrackers, valued at $8,472 with intent to evade the prohibition order (L.N. 624 dated 26.10.54 — Customs (Prohibition of Imports) Order, 1954) applicable to such goods, contrary to section 131(1)(e) and punishable under section 131(1)(iii) of the Customs Ordinance, 1952.

2nd charge:

That you, (1) Chi Ah Kow, (2) Loo Eng Hock and (3) Kamoo bin Alladin at the same time, date and place, were knowingly concerned in conveying in Motor Lorry No: NA 4079 prohibited goods, to wit 4 cases containing 400 x 1 lb. plastic bags saccharine, valued at $1,600 with intent to evade the prohibition order (L.N. 477 dated 13.7.54 — Sales of Food and Drugs (Amendment) Regulation, 1954) applicable to such goods, contrary to section 131(1)(e) and punishable under section 131(1)(iii) of the Customs Ordinance, 1952.

3rd charge:

That you, (1) Chi Ah Kow, (2) Loo Eng Hock and (3) Kamoo bin Alladin at the same time, date and place, were knowingly concerned in conveying in Motor Lorry No: NA 4079 prohibited goods, to wit 100 cartons containing 400 dozen tins sardines manufactured in the Union of South Africa valued at $2,400 with intent to evade the prohibition order (L.N. 161 dated 12.7.60 — Customs (Prohibition of Imports) Order, 1960) applicable to such goods, contrary to section 131(1)(e) and punishable under section 131(1)(iii) of the Customs Ordinance, 1952."

The first and the third respondents were convicted on the first and second charges and were acquitted without their defence being called on the third charge. The second accused was acquitted on all three charges. The Public Prosecutor has appealed against the acquittal of the second respondent on all the charges and against the acquittal of the 1st and third respondents without their defence being called on the third charge. He also appeals against the sentence imposed upon the third respondent because he had been previously convicted of an offence against the Customs Ordinance. It will be noticed in passing that the 1st and 3rd respondents did not appeal against their convictions on the first

two charges and they are in fact serving their sentence as they have failed to pay the fines imposed upon them.

The facts upon which the learned President convicted the 1st and 3rd respondents and acquitted the 2nd respondent are set out concisely in his grounds of judgment. It reads:—

"2. The salient facts for the prosecution were that on the 3rd of November, 1961 at about 10.15 p.m. Senior Revenue Officer (P) 339, led a party of four other Revenue Officers to the 17th mile Gelang Patah Road where they laid an ambush by the side of the main road in the bushes on a ground slightly higher than the road. From this vantage point they could see the road well and vehicles coming and going along the said road. A number of motor vehicles passed by but only one motor lorry which after passing the ambush position turned left into an estate road about a quarter of a mile away and proceeded along the road which led to the sea front. The vehicle then disappeared from sight and the headlights were turned off. At about 4.45 a.m. the customs party saw headlights of a vehicle coming out from the same estate road; the vehicle turned right and travelled along the Gelang Patah Road towards the direction of Scudai. When passing the ambush position, they saw it was a motor lorry covered with tarpaulin. They gave chase and caught up with the lorry after about 3 miles. It was motor lorry NA 4079. The driver was accused No. 1 and sitting by his side was accused No. 2. Accused No. 3 was at the back of the lorry. The lorry was escorted back to Johore Bahru together with the goods. On checking, the three kinds of goods as mentioned in the charges were discovered in the lorry. From the pocket of accused No. 3 P.W.3 discovered a document written in English (Ex. P4). P.W.3 handed the 3 accused and all the exhibits to senior customs officer (P) Lee Yat Chong (P.W.8).

Accused No. 1 admitted to P.W. 8 that he was the driver of the said lorry and after some hesitation stated that all he knew about the goods were that there were some sardines. He further stated he was carrying the goods from an estate in Johore to Seremban after he and the attendant accused No. 2 assisted the Indian (accused No. 3) to stack the goods in the lorry. The transport charges, he stated, was $200 with a promise of $100 for himself and accused No. 2 from accused No. 3.

On unloading the goods were found to consist of 74 sacks of firecrackers (Ex.P6), 100 cases of South African sardines (Ex.P5) and 4 cases containing 400 lb. of saccharin, (Ex.P7). P.W. 8 noticed that 4 of the 74 sacks of firecrackers were wet at the four corners. Samples of each goods were taken, numbered, sealed and sent to the Government Chemist, Kuala Lumpur who issued two certificates (Ex.P1 and P2) which were duly served on the three accused.

The prosecution called the registered owner of the lorry in question (P.W.10) who testified that his son P.W. 11 was taking charge of the vehicle apart from being the driver. As such he had authority to hire the said lorry to others. He further stated that his other son, accused No. 2 was the attendant. P.W. 11 corroborated the evidence that P.W. 10 was the registered owner and that accused No. 2 was the attendant. On 3.11.61 at about 9.00 p.m. accused No. 1 came to hire the lorry from him for the purpose of carrying sundry goods from Gemas to Seremban from another lorry which had broken down. The fare agreed upon was $80. He did not drive the vehicle as he was not free that night but instructed his younger brother, accused No. 2 to accompany accused No. 1 as attendant as it was normal practice for the attendant to accompany the lorry when it was on hire. However he did not tell accused No. 2 how far the lorry would go but simply instructed him to follow the vehicle as attendant."

After hearing Che Hamzah. Federal Counsel who appeared on behalf of the Public Prosecutor, argue for the reversal of the acquittal of the 2nd respondent, I did not call on Inche Omar Saleh and dismissed the appeal. In deference to the learned Deputy's arguments I will give my reasons.

The learned President in dealing with the case of the 2nd respondent says:—

"In his defence the accused No. 2 testified that he was instructed to accompany the said lorry by his brother (P.W.11) as he was the attendant, to pick up goods from a broken down lorry. He was not informed of the destination. He sat at the back of the lorry and slept during the journey until they arrived at a certain spot which he did not know. Soon another lorry arrived and with the help of two other persons on the second lorry he assisted in transferring the goods to his father's lorry. He did not know what goods were being transported except that some were sardines.

His evidence that he was employed as the lorry attendant was corroborated by that of P.W. 10 and P.W. 11 and the fact that he was simply instructed to accompany accused No. 1 in the said lorry as attendant was supported by P.W. 10. In fact according to P.W. 10 he was informed by accused No. 1 that he was driving the said lorry to pick up goods at Gemas. The haulage permit for the lorry allowed the vehicle to transport goods only within the State of Negri Sembilan.

I am satisfied that the explanation of the accused No. 2 was reasonable under the circumstances. When he assisted in transferring the goods to the lorry in question and put up the tarpaulin to cover the goods, he was only doing the duty of a lorry attendant. I therefore acquitted and discharged him on both charges."

The learned Deputy argued that the explanation of the 2nd respondent was highly unreasonable. He underlined in particular that the haulage permit in respect to the vehicle was not valid in Johore, and that the 2nd respondent helped in the loading, and was found sitting in the front of the lorry when it was stopped by the customs officers. That may well be, and it may well be that had I been sitting in Tuan Syed Agil's place I would not have found as he did. But that is not enough. I certainly cannot say that on the consideration of all the evidence the decision of Tuan Syed Agil was against the weight of evidence or that the evidence of the 2nd accused when considered in the light of all the evidence might not reasonably be true. I agree that the presumption contained in section 131(2) applies but the learned President was of the opinion that explanation of the 2nd respondent that he knew nothing about the proposed plan to carry prohibited goods rebutted such presumption. As Buhagiar J. has said in *Chee Shih Kwang* v. *Public Prosecutor* [1]:—

"There (in *Saminathan* v. *Public Prosecutor* [2]) I held that in cases under the said section 131(2) the accused has to prove that he did not know that the goods were uncustomed or adduce such evidence as to make the existence of the fact that the accused had no knowledge that the goods were uncustomed so probable that a prudent man ought, under the circumstances of the case, to act upon the supposition that that fact exists."

Adopting that test, it was certainly open to the learned President on the evidence to find as he did, and to acquit the 2nd respondent on all three charges.

But the main argument in this appeal was directed to the acquittal of the 1st and 3rd respondents without calling upon their defence in

respect to the 100 cartons containing 400 dozen tins of what the prosecution said were South African sardines. The importation of these goods, if it were so established that they were goods originating in or manufactured wholly or mainly in the Union of South Africa or any territory administered by the Union of South Africa is absolutely prohibited provided that they had not been loaded into any vessel aircraft or other conveyance before the 1st August, 1960, for shipment or movement direct to the Federation of Malaya. The tins themselves were labelled 'Pelican Sardines' and the label gives the following information:—

SOUTH AFRICAN SARDINES
PELICAN BRAND

PACKED FOR
FEDERAL FISH PACKERS LIMITED
P.O. BOX 4239 CAPE TOWN

PRODUCT OF SOUTH WEST AFRICA

The learned President considered that this was not sufficient proof of origin. He drew a distinction between the case of *Quek Thiam Ting & Anor.* v. *Rex* [3] which was followed by Pretheroe J. in the Malacca case of *Yeo Chin Lee* v. *Public Prosecutor* (Malacca Criminal Appeal No. 4 of 1949) by implication at least since Chua D.J. (as he then was) had held that the fact that certain tins found in the appellant's tongkang were embossed with the Shell Company's usual design and the word "Kerosene" was sufficient to establish that the tins contained kerosene without the necessity of the strict proof by analysis, and the learned Judge dismissed the appeal. The learned President has argued that all the judgment of Brown J. in *Quek Thiam Ting's* case establishes is that for the purposes of the Price Control (Whisky & Gin) Order 1946, the fact that a bottle is labelled as it was in that case is sufficient to establish that it is Scotch whisky but not that it was manufactured in Scotland. With great respect to the learned President who has considered this matter most carefully, I think this is splitting hairs. If there is a sealed container and the sealed container is stated to contain something made somewhere, I think that must be *prima facie* evidence that what is stated on the container is correct, and that it was in fact *prima facie* manufactured where it says it was. The late Mr. Walters appeared for the appellant in the *Quek Thiam Ting's* case and he was unable to find any case on all fours with that case that decided the point. I have also searched but the English cases usually refer to the improper use of labels under some specific statute, and I have found nothing really helpful. On consideration, I have come to the conclusion despite the most persuasive argument by the learned President, that this must be looked at as a matter of common sense, and that if an article is labelled as it is in this case that is *prima facie* evidence that it is a product of South West Africa which is administered by the Union of South Africa. The second error into which the learned President has, I think fallen, arises out of his interpretation of the Customs (Prohibition of Imports) Order 1960, which reads:—

"1. This order may be cited as the Customs (Prohibition of Imports) Order, 1960.

2. (1) This Order applies to all goods referred to in paragraph 3 of this Order, except those loaded into any vessel, aircraft or other conveyance before the first day of August, 1960, for shipment or movement direct, or with transhipment on a through bill of lading to the Federation of Malaya.

(2) The provisions of the Customs (Prohibition of Imports) Order, 1954, shall not apply to any goods to which this Order applies.

3. The importation of all goods originating in or manufactured wholly or mainly in the Union of South Africa or any territory administered by the Union of South Africa is hereby absolutely prohibited."

The learned President interprets that as making only those goods prohibited goods which are the subject matter of the Order and which were loaded on ships, aircraft or other conveyance for direct transportation to Malaya before the 1st August, 1960. I agree that is the general effect of the Order, but it is not what the order says. Paragraph 3 prohibits absolutely the import of goods originating in or manufactured wholly or mainly in the Union of South Africa or territories administered by her. There is then a privilege or exemption accorded to goods loaded for direct transportation to Malaya before the 1st August 1960, by paragraph 2 of the Order. Therefore on my reading of the Order it would seem to me that any South African goods in the country are prohibited goods, and that they became so at the date of the coming into force of the Order, and if the owner of those goods wants to claim the protection of paragraph 2(1) then under the normal provisions of law contained in section 106 of the Evidence Ordinance, the onus is on the owner to show that he is entitled to take advantage of that privilege or exemption. That being the case, at the time the lorry was stopped there was *prima facie* a conveying of prohibited goods and the presumption under section 131(2) arose that the accused knew that they were prohibited until they satisfy the Court on the balance of probabilities that the contrary was so.

If these goods were prohibited goods, then as the learned President has said, section 115 of the Customs Ordinance would also apply since this was a prosecution in respect of goods seized in respect to "any other cause of forfeiture" that is to say in the present case, the carrying of prohibited goods, and the onus is on the defendant to satisfy the Court on the balance of probabilities that the goods were lawfully imported or loaded.

It seems to me therefore that since the prosecution has *prima facie* established that these goods were prohibited, in view of the presumptions contained in section 131(2) and section

115 of the Customs Ordinance, and indeed, on the facts of the case even without them the prosecution have made out a case against the accused which if unrebutted would warrant their conviction upon the offences with which they stand charged. I think therefore that the order of acquittal must be set aside and the matter sent back to the President with a direction that he should call upon the accused to make their defence.

The last ground of appeal was that the sentences of $5,000 or one year on the first charge and $3,200 or 8 months on the second charge are, in view of the fact that the 3rd accused had a previous conviction for a similar offence within a year, manifestly inadequate. On the question of sentence the learned President says:

"With regards to the sentences on the 1st and 2nd charges on accused No. 3 who had pleaded guilty, I would agree that he should have been dealt with more severely than the others as he appeared to be the leader. However, considering the submission that he was paid $100 to do the job and the mention of a certain Chinese 'Ah Kwai' by the first accused in his evidence who had approached him to hire the lorry, I believe that accused No. 3 was only an agent who had committed the offence on payment of the money. Under the circumstances I feel that the fines imposed were adequate punishment and a deterrent in view of the terms of imprisonment in default of payment of fines. I understand that the accused No. 3 is now serving his terms of imprisonment for failing to pay the fines."

This would indicate to me that the President clearly set his mind to the question of sentence and gives reasons for making no distinction between the 1st and 3rd accused. I do not think that the learned President has acted on wrong principles or that the sentence is so manifestly inadequate as to warrant the appellate court interfering with it, and that ground of appeal must be dismissed.

In conclusion I must pay tribute to the way Mr. Low Sang Chin, the Senior Customs Officer prosecuted this case before Tuan Syed Agil, the learned President of the Sessions Court. He has prosecuted with great fairness and with the ability which one always expects from the Customs Department. He had clearly taken the greatest trouble to assist in the administration of justice. He had done considerable research and was able to refer the learned Deputy to the Malacca case of *Yeo Chin Lee* to which I have referred. I also must pay tribute to the great trouble and care that the learned President has taken in his grounds of judgment. It is true that I am unable to agree with all his conclusions, but he may take comfort in the words of Thomson C.J. who, in the case of *Ng Kim Huat* v. *Public Prosecutor* [4] said:—

"The Customs Ordinance, 1952, is not very easy to understand. Many of its provisions are only comprehensible after reference to a long series of definitions, many of them very artificial, contained in the interpretation section and there are a number of 'reversal of onus' provisions which are sometimes not very easy to follow or to apply."

The order must therefore be that the appeal against the acquittal of the 2nd accused is dismissed, the appeal against the acquittal of the 1st and 3rd accused on the third charge without their defence being called must be allowed and the case remitted to the Sessions Court with a direction that they be called upon to enter upon their defence, and the appeal against the inadequacy of sentence imposed upon the 3rd accused must be dismissed.

Order accordingly.

Solicitors: *M. Ismail & Co.*

SHANMUGAM v. PUBLIC PROSECUTOR

[A. Cr. J. (Hepworth J.) August 11, 1962]

[Penang — Criminal Appeal No. 15 of 1962]

Criminal Procedure — Trial — Defence of alibi — Whether proof necessary to establish alibi.

Criminal Evidence — Character evidence — When admissible — Evidence Ordinance, 1950, ss.53 and 54.

Criminal Evidence — Witness — Evidence of, who did not go to police on own accord.

Penal Code, s.392 — Robbery.

Where the defence to a criminal charge is an *alibi* it is not necessary that the accused prove his *alibi* beyond reasonable doubt. All that he has to do is to cast a doubt upon the prosecution story. It is not necessary for this to be achieved that the evidence of the accused should be corroborated.

The law of evidence as to character in Malaya is different from that in England. The fact that an accused person has a bad character is irrelevant unless evidence has been given that he has a good character. Where an accused has not put his character in issue, but has merely attacked the character of the prosecutor in cross-examination, evidence cannot be called by the prosecution to prove that he is a man of bad character.

A witness should not be disbelieved, where the police have not asked him for a statement, just because he did not on his own accord go to the police and make a statement.

MAGISTRATE'S CRIMINAL APPEAL.

David Choong for the appellant.

Wan Sulaiman bin Pawan Teh (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Hepworth J.: The appellant had been convicted in the Sessions Court, Penang, of the offence of robbery under section 392 of the Penal Code and had been sentenced to two years' imprisonment. From this conviction and sentence the appellant appealed.

There were eight grounds of appeal, three of which raised questions of law and the remainder questions of fact.

The defence was one of *alibi*. From his grounds of judgment the learned President appears to have considered that there was an onus on the appellant of proving his *alibi* beyond reasonable doubt. It was submitted on behalf of the appellant that this was a misdirection in law as all that the appellant had to do was to cast a doubt upon the prosecution story. With this submission I agreed.